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Breaking Up is Hard to Do:

The Neil Sedaka Theory of Independence Referendums

“International politics is never about democracy and human rights. It's about the interests of states. Remember that, no matter what you are told in history lessons”

Egon Bahr, German Diplomat (1922 –2015)

Abstract: This article analyses the factors conducive to recognizing independence referendums and to winning these votes. After a *tour d’horizon* of the history of referendums on independence and a summary of the legal position, the article argues that independence referendums are most likely to be implemented when this is in the interest of the three Western Powers on the UN Security council. While there is a statistically significant correlation between the support for independence (the yes-vote) and international recognition, this is much lower than the 100 per cent association between support of the three permanent Western Powers on the Security Council and international recognition. Countries may cite legal, democratic and philosophical principles but the statistical and historical facts suggest that these are of secondary importance when it comes to recognising states after independence referendums.

The Context and Development of Independence Referendums

This is an article about the recognition of new states and the role of referendums in the process. Given the interdisciplinary nature of the topic (it straddles political science, law and even moral philosophy), the article will consider the ethical arguments for secession and recognition, the legal norms governing the process, and the positive and political science theory of when would-be states succeed in becoming recognized by the international community. Throughout, the article seeks to understand the role of referendums in the process of establishing new states, and, as a corollary, their role (if any) in winning international recognition. The general hypothesis – though not stated in strictly Popperian terms (See Popper 1963) – is that power politics plays a decisive role and that legal principles and democratic legitimacy play more subordinate roles.

Referendums have played a pivotal – and often controversial role – in the declarations of independence, and the ‘will of the people’ is often used as a political trump card that overrides other concerns and even constitutional positions. For example, when Russia annexed Crimea (after the peninsula had voted for independence from Ukraine in 2014 in a referendum of dubious legality and questionable fairness), Vladimir Putin stated, that the referendum was justified, and moreover ‘the [Crimea] referendum was fair and transparent, and the people of Crimea clearly and convincingly expressed their will and stated that they want to be with Russia’ (Kremlin 2014).

However, when the same argument was invoked in the case of Bosnia's declaration of independence in 1991 – albeit this time by western powers – Russia disagreed (Orentlicher 2003). What is puzzling about this debate is that references to referendums are used selectively; sometimes governments base their arguments on direct democracy, at other times they don't. For example, Russia recognized the 'right of self-determination in Crimea in 2014, but denied the same right to the Kosovans two decades earlier. Likewise, the Western States recognised Ukraine in 1991 but did not recognize Kurdistan in 2016. This raises the question if the 'will of the people', as expressed in referendums, is but an opportunist tool in the hands of politicians or if it is an objective norm with legal and political force? Before we can move on to answering these questions, a brief overview of the broader literature is required.

There is a considerable literature on secession, independence and the recognition of new states. Pioneering articles and books from the early 1980s (Wood, 1981; Beran 1984), have been complemented by research reflecting the situation after the end of the Cold War and in the first decades of the 21st Century. This research follows different strands and arguments, and it is difficult to identify a clear single paradigm. Some scholars, beginning with Buchanan (1997) consider the normative aspects of national self-determination (Waters 2020). The prescriptive case for when states should be allowed to secede has even been developed into a more general theory (Wellman 2005). Other contributions to the literature, consider the legal norms – such as they are – of establishing new states and their recognition by the international community. Often drawing on the pioneering work of earlier jurists (Kelsen, 1941; Lauterpacht, 1944), recent research in positive legal theory and have sought to summarize the international law of secession and recognition (Rai, 2002; Kohen and Kohen, 2006; Radan 2012). This article recognises these earlier contributions but brings earlier jurisprudence up to date in the light of recent judgements and *obiter dicta* in international and national courts. This is not a paper on jurisprudence or legal theory, and the paper engages with the legal arguments from the point of view of political science. Hence it does not seek to assess the arguments' congruence with *opinio juris* but rather with interests and *realpolitik*. As such the present paper analyses the essentially power-based argument which is hypothesized to lie behind the judgements by legal institutions. Thus, the present paper draws on a multidisciplinary approach similar to that pursued by (Burke-White, 2014; Christopher, 2011). In this way, the paper draws on empirically oriented political scientists who have looked at the causes of secession and recognition. This strand of research includes comparative politics (Mendez and Germann, 2018; Fabry, 2010; Lehning, 2005), international relations (Pavkovic and Peter Radan, 2016; Coggins 2011), and research on public administration (Qvortrup 2013 for a summery). Especially the contributions by Pavkovic and Radan (2016), Fabry (2010), Burke-White (2014) and Christopher (2011) stand out as they use concrete empirical studies to understand the anatomy of secession and independence. These studies, especially the two former ones, are important as they have drawn on concrete cases, and on literature and primary evidence in Slavonic languages. However, this ideographic approach, which is also pursued in Christopher (2011) - means that there are questions of representativeness which make it difficult to draw more universal conclusions. The present paper, unlike the earlier studies, widens the scope and considers the whole universe of the creation of new states. This paper is substantially based on evidence provided by Coggins (2011), namely that 'international [power] politics ultimately

determine which aspiring system members will succeed in becoming new states' (Coggins 2011: 433). However, it does this by focusing on the role of referendums in the process of secession, something Coggins only mentions in passing. This focus means that the article contributes to an area which is much discussed and debated, yet one that only in recent years has been the subject of empirical study. Apart from a handful of books and articles (Dion, 1996; Leduc, 2003; Laponce, 2010; Qvortrup, 2014), most of the literature has focused on single country case studies from new states (Potichnyj, 1991; Muiznieks, 1995). All these studies looked at the input-side of the independence referendum; the decision to call a referendum (Qvortrup, 2014), its organisation (Laponce, 2010) and the factors determining the people's decisions (Dion, 1996). This article looks at the effects (if any) of these votes on the decisions by the international community to recognise (or not) the seceding state. While there is a large literature on the international relations of recognition (Fabry, 2010) and sovereignty (Krasner, 1999) this literature has hitherto not been related to scholarships on referendums. This paper changes this.

Before looking at the factors determining the fate of independence referendums, it is useful to put these into context of the general literature on these votes. Overall, there are three types,

- Ad hoc referendums (questions to solve a perceived political issue – such as David Cameron's decision to hold a referendum on UK membership of the European Union 2016);
- Initiatives (votes initiated by a specified number of electors on a) already enacted legislation (as in Switzerland) or b) on new laws (as in Hungary), and;
- Constitutional Referendums (see next paragraph).

By convention, there are three types of Constitutional Referendums,

The Constitutional doctrine normally distinguishes between three types of constitutional referendums: on the approval of the constitution, on its revision, and on sovereignty issues (like the foundation of a new state) (Morel, 2012: 504).

There has been a considerable debate on independence referendums and scholarly writings about them (Laponce, 2010; Leduc, 2003; Qvortrup, 2014) but the number of them is comparatively small. There has similarly been considerable debate as to what constitute an independence referendum. Mendez and Germann (2018) adopt a broad definition and identify no less than 602 'sovereignty referendums' in the period 1776-2012. However, this category also includes referendums on self-government, devolution and issues that fall short of statehood. As this article is focussed on referendums that pertain to the establishment of a new state or a new subject in international law, the number of cases in the present study is considerably smaller.

Thus, out of the 1200 nation-wide referendums held since 1793, only 60 (or 6 per cent) have pertained to independence (of which only three (or 5 per cent) have returned a 'no' vote (Quebec, in respectively, 1980 and 1995, in Scotland in 2014 and New Caledonia in 2018).

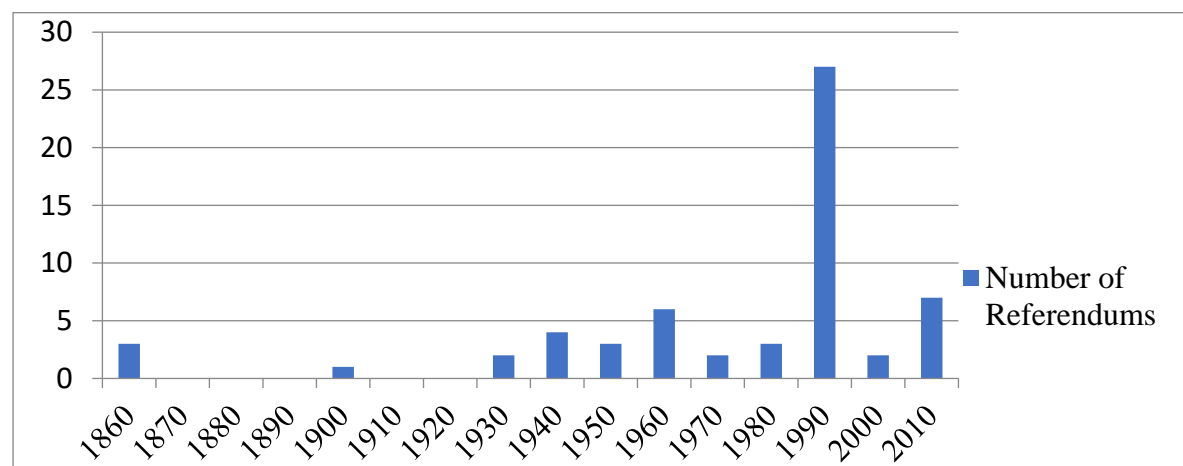
(Though other referendums have failed because they did not satisfy super-majority requirements, e.g. in Nevis in 1998 and in several referendums in Palau in the 1980s).

Historically, independence referendums have come in waves. In the early 1860s, the US states of Arkansas, Tennessee, Texas and Virginia – held referendums on independence following the election of Abraham Lincoln to the US presidency. All the referendums were won but no country recognised the results (Mattern 1921).

The result of the referendum in Virginia is particularly noteworthy. Before the vote, representatives from counties in Western Virginia declared that they, in the event of a ‘yes’ vote for independence, would establish a new state and that the constitution of this new state would be approved by the voters in a referendum.

Virginia as a whole voted for secession: 21,896 were in favour – 16,646 were against. However, in the western counties 8,375 out of the 9,758 votes cast were against secession (Mattern, 1920:120). The western counties sent delegates to a specially convened convention, which declared the referendum in Virginia as ‘illegal, onoperative, null, void and without force and effect’ (Quoted in Mattern, 1920: 123). They then ‘passed an ordinance providing for the formation of a new state out of the portion of the territory of this state [Virginia]. This ordinance was to be and was submitted to a plebiscite’ (Mattern 1920:123). 18,000 voted for a new state 781 voted against it. (Cited in Mattern. *ibid*).

Figure 1: Referendums on independence 1860-2017



Note: This figure does not include the four multi-option referendums in Puerto Rico (1968, 1993, 1998 and 2012), which formally included ‘independence’ as one of the options. However, the table includes the two-round multi-option referendum in Newfoundland in 1948 as independence was one of the choices in the run-off. The independence options lost to ‘statehood’ and the former British territory became a Canadian Province. (See Qvortrup 2014: 69)

After the American Civil War, the US Supreme Court established in *Texas v White* that unilateral declarations of independence were unconstitutional. This principle was sustained most recently when the Alaskan Supreme Court in 2006 in *Kohlhaas v Alaska* ruled a constitutional initiative for independence for the state to be *ultra vires*.

After the American secession-votes there was gap of a few decades before Norway voted in a referendum on independence in 1905, and then a hiatus again until the mid 1930s when the number of independence referendums began to pick up with the unrecognised, but successful, independence referendum in Western Australia in 1933. In this case, 68% voted in favour, but the vote was ignored as the secessionist party lost the state election on the same day (Qvortrup, 2014: 29). The vote for independence for the Philippines in 1935 was another example.

After the Second World War, the referendum device was increasingly used to show popular approval for decolonization, though not all countries held plebiscites before they broke with their erstwhile colonial overlords. This was especially the case in French colonies such as Cambodia (1945), Guinea (1958) and Algeria (1962).

After a drop in the 1970s, there was an explosion of independence votes in the years immediately following the fall of the Berlin Wall and the collapse of Soviet Communism.

Not all independence referendums are comparable. Different historical and legal circumstances play a role. As stated in the introduction to this special issue (Lapachelle and Qvortrup, this issue), there is a fundamental difference between polyarchies and autocratic states, as well as there is a distinction to be made between ethnic and civic nationalism.

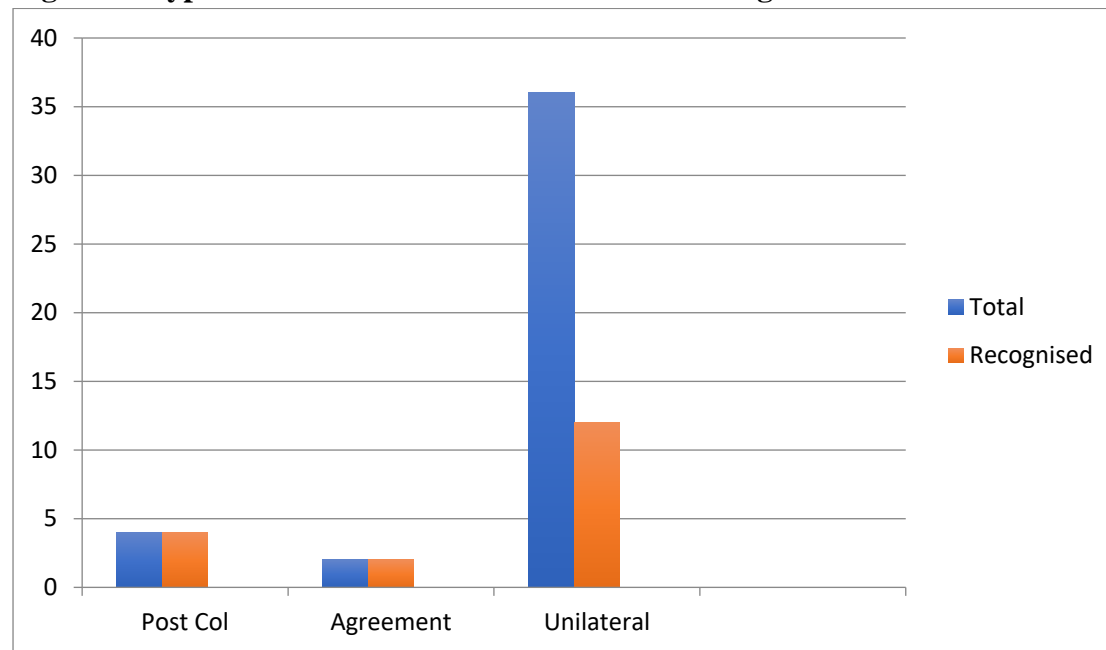
While there are examples of civic nationalist movements in polyarchic states (e.g. Scotland 2014), as well as in competitive autocracies (South Sudan and East Timor), the vast number of independence referendums take place in polities where politicians seek to exploit ethnic nationalist feelings (Qvortrup, 2014). Most of these referendums are held in countries with less than pristine democratic records. Thus, while there is at least one example of a polyarchic polity where ethnic nationalist arguments have thrived (e.g. Canada in 1995), the vast majority of referendums on independence have taken place in competitive autocracies and have seen would-be leaders of new states appeal to ethnic nationalism (see, e.g. Ukraine, Croatia and Eritrea).

In addition to these sociological differences, there are also legal differences between the types of referendums held. Subdividing independence referendums Şen (2017: 213), distinguishes between three pure types,

- 1) Post-Colonial (e.g. Philippines 1935);
- 2) By agreement (Montenegro 2006 and New Caledonia 2018);
- 3) Unilateral: (Quebec 1995 and Somaliland 2001).

Their frequency and success rate is shown in Figure 2.

Figure 2: Types of referendums and international recognition



Based on Şen (2017) and Qvortrup (2017)

Legal recognition

Not all of these different types of independence referendums have been equally conducive to the establishment of a new independent state. As Coggins has previously noted, ‘evidence supporting the consent-first requirement is equivocal’ (Coggins, 2011: 445)

As Figure 2 shows, all the referendums in post-colonial territories (such as the Philippines in 1935, Micronesia 1983 and most recently in East Timor in 1999) have been recognised if the voters have returned a yes vote. The same is true for referendums held following an agreement, such as in the cases of the Montenegro referendum in 2006 and the referendum in South Sudan in 2011. At the time of writing it is still unclear if the outcome of the 2019 Bougainville referendum will be recognised by the international community as the vote needs to be ratified by the Papua New Guinea parliament in accordance with a pre-referendum agreement. In the referendum 98 percent voted for secession on an 87 percent turnout.

It seems that the international community – which oversees these two types of referendums – have been keen to ensure that their endeavours have not gone to waste, though it should be noted that some international agreements on popular votes have not resulted in actual referendums being held. The planned referendums on the futures of, respectively, Kashmir and Western Sahara are cases in point. These two latter referendums deserve to be mentioned although – or perhaps because – no referendum has taken place in either of the jurisdictions. Thus, despite being condemned by the UN Security Council for its illegal annexation of Western Sahara, Morocco has delayed holding a referendum on the future status of annexed area in flagrant contravention of international law due to uncertainties over the electorate.

Similar delaying tactics have been deployed by India over the disputed territory of Kashmir. The UN Security Council called for a referendum in Resolution 47, which stated that ‘A plebiscite will be held when it shall be found by the Commission that the cease-fire and truce arrangements set forth in Parts I and II of the Commission's resolution of 13 August 1948’. That was 70 years ago at the time of writing. To date no referendum has been held.

However, when referendums are held, the outcome has been accepted by the international community and by the parent states. Indeed, even when the result of the referendum was not legally binding (due to the doctrine of parliamentary sovereignty) the outcome of the referendum has been ratified by parliaments. Thus, the parliament of Indonesia – after considerable pressure from the international community – recognised the outcome of the 1999 East Timorese independence referendum.

The situation is markedly different for unilateral independence referendums. This type of independence referendum constitutes the majority of the 44 independence referendums held since 1980. Thirty six or 85% were in this category. Only in one in twelve cases was the referendum followed by international recognition of the new state.

Why is it that some referendums – even unilateral ones – result in the establishment of a new state (such as in the case of Bosnia, Estonia and the Ukraine) but not in other cases such as in Catalonia, Tartarstan and Somaliland? To answer this, we need to look at the legal aspects pertaining to – what misleadingly – is called the ‘right to self-determination’ (Dobelle, 1996).

The legal argument

Legal philosophers may disagree at the theoretical level as to whether the law is the way acts of parliament or legal precedents are interpreted by the courts or whether there is some higher legal principle – or natural law – which overrides ‘black letter law’. Proponents of the latter view include Thomas Aquinas (1224-1274), but the doctrine can be traced back to Sophocles’ *Antigone* in fifth Century BC who held that statutes and precedents that are at odds with natural law must give way. That is, ‘a legal norm fails to be valid if it goes against the human reason, regardless of the fact that it has been adopted by the state’ (Thomas Aquinas quoted in Şen 2015: 59). St Thomas even accepted that it would be justified to break the law would be warranted if “it should happen that the observance of such a law would be damaging to the general well-being” (Aquinas 1959: 141).

Whatever the philosophical merits of this view, courts and governments do not tend to be persuaded by legal theory or jurisprudence. Thus, while the late legal theorist Neil MacCormick, in the case of the United Kingdom, believed one could answer the question ‘Is there a constitutional path to Scottish independence?’ affirmatively (MacCormick 2000), this is very much a minority view among practicing lawyers.

Thus, while one may philosophically disagree with the ethical and moral tenants of legal positivism, this doctrine holds sway in practical politics. Hence, the following is based on a reading of the black letter law pertaining to independence referendums.

The black letter law of the ‘right’ to self-determination referendums is, in a sense, very simple. In the words of James Crawford, ‘there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory’ (Crawford, 2006: 417). Those who espouse a similar legal positivist approach will further stress that this is consistent with the jurisprudence of international courts. Thus, in an *obiter dicta* in the Kosovo Case Judge Yusuf, opined,

A radically or ethnically distinct group within a state, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral self-determination simply because it wishes to create its own separate state (Re Kosovo, 2010: 1410).

This view regarding the legality of independence referendums is near identical to the doctrine followed by domestic courts. In the Canadian case of *Bertrand v. Québec*, it was held *per* Justice Robert Lesage that a referendum on a unilateral declaration would be, ‘manifestly illegal’. This is still the legal position notwithstanding the reasoning in the much cited (and little often misunderstood) *Re Quebec* (see below).

Thus, the general rule is that referendums have to be held in accordance with existing constitutions (such a provision exists in Art 39(3) of the Ethiopian constitution and was used when Eritrea seceded in 1993. But few other states provide for this possibility, the exceptions are Art. 74 of the Constitution of Uzbekistan, Art. 4 of the Constitution of Liechtenstein and previously Art. 60 of the Constitution of Serbia-Montenegro.

Another legal avenue to secession is after an agreement between the area that seeks secession and the larger state of which it is part (this is what happened in the very different cases of East Timor 1999, South Sudan, 2011, Scotland 2014, and a fortiori Bougainville 2019 (Radan, 2012: 14).

Following this logic, it would seem that the referendums in both Catalonia and Kurdistan, to take two recent examples, were both illegal and unconstitutional. The same argument was used by Barack Obama in the case of Crimea. A few days before the poll, the US President said, ‘the proposed referendum on the future of Crimea would violate the Ukrainian constitution and violate international law ... we are well beyond the days when borders can be redrawn over the heads of democratic leaders’ (White House 2014).

Based on the same reasoning, the Soviet leader Mikhail Gorbachev was well within his right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the Spring of 1991 were illegal and that he was the guarantor of *Pravovoe gosudarstvo* – the equivalent of the rule of law in Soviet jurisprudence. Of course, some would say, previously, under the so-called *Stalin Constitution 1936*, individual Soviet states did indeed have the right to self-determination referendums under Art 48. But this provision had been dropped in the

Khrushchev Constitution of 1956. Consequently, the Baltic republics were in breach in the early 1990s.

Yet, these niceties of constitutional theory were forgotten by Vladimir Putin a couple of decades later. Speaking before the referendum in Crimea in 2014, the Russian President stated that ‘declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law’ (Kremlin 2014).

Let’s once again consider the Catalan and Kurdish cases. As, respectively, the Iraqi and the Spanish constitutions do not allow for independence referendums, the two referendums held in these two entities referendum were, it would seem, *ipso facto*, unconstitutional.

Yet matters are not that simple. Admittedly, all other things being equal, a country only has a right if it follows the rules. However, when a region is part of an undemocratic constitutional order matters are a bit more complex. Antonio Cassese has argued,

When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure...a group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail (Cassese, 1995: 119-120).

As Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. Again, the comparison with the Soviet Union is illustrative. Notwithstanding Gorbachev’s reforms, the USSR was not a democratic regime, which consequently, provided the Baltic States with a justification for holding referendums. Interesting, Vladimir Putin used the same justification for the referendum in Crimea in 2014. Somewhat stretching the argument Putin followed the same line,

[Putin] claimed that these ethnic Russians, who included some Russian citizens, had been subjected to the kind of systematic oppression that triggers the right of self-determination under international law, calling the members of the Ukrainian government ‘nationalists, neo-Nazis, Russophobes and anti-Semites’ who had introduced ‘a draft law to revise the language policy, which was a direct infringement on the rights of ethnic minorities’ and were the ‘ideological heirs of [Stepan] Bandera, Hitler’s accomplice during World War II’ (Burke-White 2014: 7)

It is not difficult to see this example as opportunist and it is clear that the international norms require more substantial violations than the ones in Ukraine – and Spain. But, given that the latter is a democratic state (according to both Freedom House and Polity IV), this rule hardly covers Catalonia. While the Spanish government, arguably acted in a way that appeared grossly

disproportionate (with police violence and the arrest of democratically elected politicians), the legal argument remains the same. Catalonia is not currently part of a non-democratic state.

Based on the situation, as it stands now, the Catalan referendum in 2017 was, from a purely legal perspective, extra constitutional. In a legal system under the rule of law, the powers of state institutions have to be established in law. The basic principle of *D'état du Droit* is that citizens can do anything unless it is expressly prohibited. Public bodies or 'emanations of the state' can *only* do things that are expressly allowed. Thus, the latter cannot *legally* speaking take actions that are not prescribed in enabling legislation. To pass legislation outside the boundaries of the constitution or enabling legislation is the very definition of being *ultra vires*.

But does the law have to be that inflexible? Not necessarily. In Canada, the two referendums held in Quebec in 1980 and 1995, were not strictly speaking within the powers granted to the Provinces by the Canadian Constitution (Şen, 2015). Technically speaking, the referendums were *ultra vires*. Yet, the Canadian judges, realising that legality ultimately rests on a modicum of legitimacy followed a more pragmatic logic. In the celebrated case, *Re Quebec*, the Court was asked the question, 'Under the *Constitution* of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?' The Court held that while the 'secession of Quebec from Canada cannot be accomplished...unilaterally', a referendum itself was not unconstitutional but a mechanism of gauging the will of the francophone province. Consequently a referendum, provided it resulted in a "clear majority", "would confer legitimacy on the efforts of the Quebec government" (*Re Secession of Quebec*, 1998: 385).

In other words, a result in favour of secession would require the rest of Canada to negotiate with Quebec. Needless to say, this ruling does not apply in Spain. But the Canadian example suggests that other countries' courts have shown a flexibility and appreciation of nuances that is conducive to compromises. These examples would seem to suggest that the international law pertaining to independence referendums is clear and simple. Alas, this is very far from being the case (For a more general discussion see Şen 2015: 77ff).

While governments may confidently cite principles, the practice of independence referendums seemingly owes more to national interest than to adherence to principles of jurisprudence. For example, the states of Western Europe readily recognised the secessions of several former Yugoslav republics in the early 1990s – although these new states did not adhere to the aforementioned legal principles. And yet, in other cases international recognition has been less forthcoming even if the countries have seemingly followed the established norms. To wit, no state has to date recognised the outcome of Nagorno-Karabakh's referendum in 1991, although Azerbaijan is very far from being a democratic state (the country has a Freedom House Score of 7 – the same as North Korea) despite the greater freedoms for the citizens/inhabitants of the break-away republic.

Similarly, no state recognised the referendum in Somaliland although this enclave is considerably more democratic, peaceful and respecting of the rule of law than Somalia, which

at the time of the referendum was an arch-typical failed state. For all the legal arguments, acceptance of referendum results is ultimately a political rather than a legal decision. In other words, are all these arguments just examples of what IR scholar Stephen Krasner (1999) with an apt phrase called ‘organised hypocrisy’? Or, are states actually recognised if they follow the rules of the game? Or, it is simply a matter of power politics?

When are referendums on independence recognised?

Lawyers are interested in what is – or is not – legal and in accordance with more or less rigid rules. Political scientists, by contrast, are interested in what actually happens and the causes effecting this. Are there from a political science– or international relations – point of view causes and tendencies associated with recognition of referendum results? Or, are independence referendums simply recognised when the rules are followed?

Alternatively, do we now live in a democratic age in which the gold standard of legitimacy is popular support? And, if the answer is in the affirmative, do independence referendums tend to be recognised when secession is supported by a large majority of the new *demos* on a large turnout? Or is it all down to power politics?

Politicians who are sure of the backing of the people often point to the legitimizing effects of referendums. This, indeed, has been characteristic of independence referendums since the earliest days. Camillo Benso di Cavour (1810-1861), the Italian statesman, who was the responsible for the politics of Italian unification, wrote the following before the s in Toscana and Emilia in 1860,

I await with anxiety the result of the count, which is taking place in Central Italy. If, as I hope, this last proof is decisive (*questa ultima prova*), we have written a marvellous page in the history of Italy. Even should Prussia and Russia contest the legal value of universal suffrage, they cannot place in doubt (*non potranno mettere in dubbio*) the immense importance of the event today brought to pass. Dukes, archdukes and grand-dukes will be buried forever beneath the heap of votes deposited in urns of voting places of Tuscany and Emilia (Cavour 1883, 211).

At the time – over 150 years ago – democratic legitimacy seemingly had a legitimizing effect. And this effect was even stronger a couple of generations later when the American political scientist Sarah Wambaugh observed, ‘There was not one of the great powers, not even Austria or Russia, which did not participate in those years [1848-1870] in some form of appeal to national self-determination to settle Europe’s numerous territorial questions’ (Wambaugh 1933: xxxiii).

In the light of the latter, it would seem reasonable and plausible that outcomes of referendums on independence would have an even stronger legitimizing force in an age where ‘democracy’ – to use a term from analytical philosophy - is an illocutionary speech-act, a term that demands unconditional observance (Searle 1968).

Yet, with recent votes – such as the one in Kurdistan in 2017 – it seems that independence referendums, despite this near universal acceptance of the rhetoric of democracy, only tend to lead to independence and recognition when this is in the national interest of major powers. Whether it is one or the other – or more likely a combination of the two – is an empirical question.

The hypothesis in the following is that power politics is the more important factor and that this can be demonstrated statistically.

Statistical Analysis

Since the 1980s there have been 44 referendums which have resulted independence. This analysis is based on the referendums held since the break-down of the Soviet Union. Before that date there had been relatively few independence referendums (only a handful in each decade). The first independence referendums were held in the US Confederate States Texas, Virginia, Tennessee and Arkansas, where narrow majorities voted for independence in 1861. Other independence referendums include Norway (1905), Iceland (1944), Jamaica (1961) Algeria (1962) and Malta (1964). For a discussion of these referendums see Qvortrup (2014) and Şen (2015). Of these 16 (or 36 per cent) have resulted in the establishment of a new state. What are the factors associated with the establishment of these new states?

Factors associated with recognition are the legal one ‘the seceding entity was part of a non—democratic state. But there are also more political ones, e.g. a high turnout and a massive yes-vote. And then, there is the factor, which this article hypothesizes to be the most important one – whether the new state has the support of the international community – or, more specifically, the three ‘democratic’ permanent members of the UN Security Council. In the analysis below we have measured some of the factors that statistically could be conducive for when states are recognised using multiple logistic regression analysis. Without going into technical detail, this analysis measures the strength of the different given factors behind a phenomenon.

The dependent variable is whether the state was recognised and took up a seat in the UN. The independent variables are the official yes vote, the turnout, the Freedom House score of the country from which the entity sought to secede and lastly a dummy variable for whether there was a support for secession among the five permanent members of the Security Council (in practice the USA, Britain and France).

As Table 1 shows, Security Council support from the three permanent Western powers is the key determining factor (statistically significant at $p < 0.01$). All the other variables were not statistically significant. This tendency is perhaps best illustrated by the example of Kosovo (See Newman and Visoka, 2018). The referendum in Kosovo was held over a decade ago, and although the result of the poll was overwhelming in favour, few countries rushed to welcome the country into the family of nations. This changed in the new century. After the Kosovan War (1998-1999), the Russians and the Chinese with secession movement of their own, continued to support their Serbian ally. The Western Powers, swung behind their ally, notwithstanding

the questionable democratic legitimacy of the earlier referendum and the relatively low level of democratization (4.5 on the Freedom House scale). Yet, the Western powers saw it as being in their national and strategic interest to recognize the former Serbian province. Electoral fairness seemed less important than power politics.

Table 1: Logistic Regression: Determinants of recognition of successful independence referendums

<u>Variables</u>	<u>Model 1</u>
Security Council Dummy	4.258*** (1.778)
Freedom House Score	-.298 (.742)
Turnout	.100 (.90)
Yes-Vote	.055 (.065)
Negotiation/Constitutional Provision	1.054 (2.35)
Constant	-15.134 (9.709)

R²: .72 (Nagelkerke): .52 N: 38

*: $p < .1$, **: $p < .05$, *** $p < .01$

Thus, whether the country part of a democracy or not (i.e. if the vote was held under the rules prescribed by legal norms) is statistically speaking irrelevant. While the direction of the statistical correlation is negative as expected (a high Freedom House score indicated less democracy), the level of margin of error – is several times above the conventionally accepted levels. Thus, it is not surprising that the Western powers – who had all but insisted that a referendum was a sufficient condition for granting Bosnia-Herzegovina its independence in 1991 took no notice when the population (mainly Serbian) in North Kosovo voted against the institutions of Kosovo in 2012 (Barlovac, Bojana and Aliu Fatmir, 2012).

Likewise, it is not surprising that they condemned the referendum on Crimea in 2014, which was held shortly after Russian supported troops had seized power on the Black Sea Peninsula. In this case the Moscow declared that the referendum was both democratic and legal, as it was held in accordance with the 1992 constitution of Crimea – and notwithstanding that the Ukrainian Constitution clearly stated that matters regarding statehood have to be decided in a nationwide referendum.

Both the principle of democracy and the ideal of the *Rechtsstaat*, were used to legitimize power politics and pursuit of national interests. It is thus interesting that, as a scholar has recently observed, in ‘Putin’s perspective, Russia’s actions in Crimea are nearly indistinguishable from

those of the US in Kosovo' (Burke-White 2014: 72). In Putin's own words 'a precedent our western colleagues created with their own hands in a very similar situation'. In his view, if a distinction can be drawn between the two cases, it rests on the fact that in Crimea not a 'single shot [was] fired' (Putin quoted in Burke-White 2014: 72).

It would appear that Hersch Lauterpacht – the great Polish-British international lawyer - was correct when he, many years ago, found that the absence of institutional mechanisms to regulate state recognition or to clearly propose when recognition should be extended, means that states are left to apply their own judgment, guided by perceptions of self-interest (Lauterpacht, 1944).

Likewise, whether the turnout was high or low did not matter one jot when it came to recognizing states. Some countries with low turnout became independent, e.g. Bosnia, others did not, e.g. Tartarstan. Whether the support (the yes-vote) was high or low was equally academic. Indeed, the yes-vote in Somaliland (1999) and Krajina (1992) both had very high yes-votes and both countries remain unrecognized.

Conclusion

Not all independence referendums are equal. There are three basic forms; referendums in postcolonial states (e.g. The Philippines in 1935), referendums following an agreement (Eritrea 1993) and Unilaterally Declared Independence Referendums (e.g. the Yugoslav Republics in the early 1990s). Whereas *all* the referendums in the two first categories were recognized by the international community and duly led to the establishment of new states the same is not true for Unilaterally Declared Independence Referendums. Less than half of the latter were recognized. What determine this low success-rate? The answer is that the factors which determine to success – or otherwise – of an independence referendum are *not* whether the entity is part of a non-democratic regime (as legal theory would have us believe), nor the turnout and the yes vote (as democratic norms would suggest), but above all if secession is supported by (and in the interest of) Britain, France or the USA.

To put it crudely, it was not in the interest of these democratic countries to recognize Kurdistan, Tartarstan, South Ossetia –or Catalonia. The great democratic powers' arguments for not doing so might be legalistic or even philosophical but the statistical evidence suggest that these factors rarely are adhered to in practice. Ultimately, what matters is the elusive and yet very real 'national interest'. Recognizing new states and their 'right' to hold referendums on independence is statistically and empirically unrelated to high theory and owes a lot to power politics and *Realpolitik*. This is not a comfortable conclusion in an age of democracy, nor is it one that may appeal to those who espouse theories of natural rights in the sphere of democracy. But as political scientists we are bound to describe the world as it is not as we would like it to be. Only a 'realistic' appreciation of the existing practices will enable us to challenge these – if we so wish.

One is tempted to cite Neil Sedaka and say, 'Breaking up is hard to do'. The lesson for the secession movements that espouse statehood and independence, and those who contemplate holding independence referendums, is this; make sure you have strong international backers

before you initiate the vote. With the benefit of hindsight, Jacques Parizeau, the Quebec Premier, made the right decision to visit Paris in 1995 to win support for independence. But, of course, he didn't manage to convince enough of his compatriots of the merits of – what he would have called – a *Québec libre*. Breaking up is hard to do!

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